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POSITION TAKEN BY THE CHINESE DELEGATION WITH REGARD TO THE REPORT AND RECOMMENDATIONS CONCERNING THE FIRST INSTALMENT OF "E2" CLAIMS (DOCUMENT S/AC.26/1998/7) AT THE 79TH MEETING OF THE GOVERNING COUNCIL, HELD ON 1 JULY 1998 AT GENEVA

I. HOW TO INTERPRET "DIRECT LOSS"?

Paragraph 16 of Security Council resolution 687 (1991) provides that Iraq "is liable ... for any direct loss, damage, ... as a result of Iraq's unlawful invasion and occupation of Kuwait." However, it has not provided a clear definition of "direct loss". The Governing Council, therefore, conducted in-depth discussions in 1992 for such a definition and then made clear explanations and provided instructions in its decisions 7,9 and 15. Decision 9 (S/AC.26/1998/9) defines three main types of general loss in category "E" claims, which includes contract losses, losses relating to tangible assets and losses relating to income-producing properties. It is certain that the scope and types of "direct loss" in category "E" claims are both clear and indisputable. This is once again proven by the United Nations Legal Counsel's response to the Executive Secretary on the issue of preparation costs.

II. WHAT IS "CONTRACT LOSS"?

Decision 9 of the Governing Council makes specific and correct rules on contract loss. Paragraph 8 states that "(w)here Iraq itself was a contracting party and breached its contractual obligations, Iraq is liable under general contract law to compensate for all actual losses suffered by the other contracting party...". Paragraph 9 states that "(w)here Iraq did not breach a contract to which it was a party, but continuation of the

contract became impossible for the other party as a result of Iraq's invasion and occupation of Kuwait, Iraq is liable for any direct loss the other party suffered as a result ...".

According to the above paragraphs, two guidelines can be drawn:

(i) Iraq is liable for all actual losses suffered when it breached its contractual obligations. If there was no breach, there should be no liability under general contract law.

(ii) Breach of contract resulting from Iraq's invasion and occupation of Kuwait is within the jurisdiction of the Commission.

What is the meaning of "breach of contract"? Black's Law Dictionary defines "breach of contract" as "failure, without legal excuse, to perform any promise which forms the whole or part of a contract." The contract provisions are the very basis for deciding whether a breach has occurred or not. As far as Iraq's contractual obligations are concerned, the factual failure by Iraq to fulfil the obligations due after 2 August 1990 (payments or other ones) provided in a contract means a breach of contract by Iraq. Since Iraq cannot use its unlawful invasion and occupation of Kuwait as a legal excuse for its failure to fulfil contractual obligations, the other party to a contract has the right to claim for compensation for all contract losses in accordance with the Security Council resolution and the Governing Council decisions.

The findings in paragraph 90 of the "E2" report (S/AC.26/1998/7) actually establish a "three months" criterion. That criterion, if adopted, means any claim wherein the claimant fulfilled its performance prior to 2 May 1990 would be excluded from the jurisdiction of the Commission.

The findings in paragraph 90 are without legal basis. First, the views of the "E2" report are not consistent with general contract law. They are not based on the provisions of original contracts, but on a subjective assumption or decision without legal foundation. Second, contracts vary in their form and content. Contracts are justified and valid as long as they are reached by relevant parties on a voluntary basis and do not violate the relevant law. The panels should decide whether Iraq breached a contract or not in accordance with the provisions of original contracts rather than whether the other party has fulfilled its performance.

III. ARE THERE ANY SO-CALLED CUSTOMARY PAYMENT PRACTICES RELATING TO THE PERIOD BEFORE THE UNLAWFUL INVASION OF KUWAIT?

The payment practice mentioned in paragraph 88 and 89 of the "E2" report was the practice of Iraq before the Iran-Iraq war, but this practice has since changed. Therefore, it is insufficient only to refer to the practice before the Iran-Iraq war when making the jurisdictional rule. The

payment practices after the Iran-Iraq war are more relevant and direct and should be taken into consideration as a main basis. During the period between the Iran-Iraq war and the Gulf War, Iraq continued its payment practice with some countries, while with others the payment period was two years.

Therefore the payment practice on which the jurisdictional finding of the "E2" report is based was only between Iraq and a number of countries. It should not be considered as a normal general practice. We believe that the jurisdictional rule should be based on various practices rather than the practice only relating to a group of countries.

IV. HOW TO INTERPRET THE "ARISING PRIOR TO" CLAUSE?

The "E2" report defines in its paragraph 65 that the word "debt" is "a monetary sum due to a creditor." We believe it is generally correct but incomplete in a legal sense. In the case of a contract, when a contracting party fulfils its payment obligation in accordance with the time period prescribed in the contract, this payment is not a debt. Only when the payment is overdue does it become a debt. If Iraq, as a contracting party, was to fulfil its payment obligation after 2 August 1990 but failed to do so because of its invasion and occupation of Kuwait, this payment is not "debts and obligations" arising prior to 2 August 1990 in the sense of Security Council resolution 687 (1991) and the related claim therefore falls within the jurisdiction of this Commission.

V. THE RELATIONS BETWEEN THE PANELS OF COMMISSIONERS AND THE GOVERNING COUNCIL

Being the decision-making body of this Commission, the Governing Council is authorized to supervise and provide guidance for the work of the Panels of Commissioners, and it should adopt a responsible attitude for all the claimants and ensure that the qualified claimants get their compensation. The Panel of Commissioners in turn should strictly abide by the decisions of the Governing Council and accept its guidance. Therefore, it is both the right and obligation of the Governing Council to redress the deficiencies in the Panel's work.